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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/491,721	01/27/2000	James W. Cree	31358-233	8978

7590

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EXAMINER

PIERCE, JEREMY R

ART UNIT

PAPER NUMBER

1771

11

DATE MAILED: 12/09/2002

Please find below and/or attached an Office communication concerning this application or proceeding.

**Office Action Summary**

Application No.

09/491,721

Applicant(s)

CREE ET AL.

Examiner

Jeremy R. Pierce

Art Unit

1771

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on 21 November 2002.
- 2a) ☒ This action is **FINAL**.                      2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 1-17 and 25-29 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-17 and 25-29 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- 11) ☐ The proposed drawing correction filed on \_\_\_\_\_ is: a) ☐ approved b) ☐ disapproved by the Examiner.
- If approved, corrected drawings are required in reply to this Office action.
- 12) ☐ The oath or declaration is objected to by the Examiner.

**Priority under 35 U.S.C. §§ 119 and 120**

- 13) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- \* See the attached detailed Office action for a list of the certified copies not received.
- 14) ☒ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).
- a) ☐ The translation of the foreign language provisional application has been received.
- 15) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

**Attachment(s)**

- 1) ☐ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO-1449) Paper No(s) \_\_\_\_\_
- 4) ☐ Interview Summary (PTO-413) Paper No(s). \_\_\_\_\_
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other: \_\_\_\_\_

**DETAILED ACTION**

***Response to Amendment***

1. Amendment B has been filed on November 21, 2002 as Paper No. 10. Claim 25 has been amended. Claims 1-17 and 25-29 are currently pending.

***Claim Rejections - 35 USC § 102/103***

2. The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

3. Claims 1-6, 9-11, 13-17, and 25-29 are rejected under 35 U.S.C. 102(b) as anticipated by or, in the alternative, under 35 U.S.C. 103(a) as obvious over Morman (U.S. Patent No. 5,336,545).

Morman teaches a composite elastic neck-bonded material comprising a necked fabric bonded to an elastic sheet (column 3, lines 19-24). The elastic sheet may be a film (column 3, lines 6-7) and can have two necked fabrics bonded on both sides of it (column 3, lines 31-35). Morman uses similar materials as the Applicant, such as polypropylene for the necked nonwoven fabric (column 25, lines 41-45) and block copolymers for the elastic sheet (column 6, lines 55-56). Although Morman does not explicitly teach the limitations ultimate force to break values of the nonwoven fabrics and the composite in grams per inch, it is reasonable to presume that said limitations are inherent to the invention. Support for said presumption is found in the use of similar materials (i.e. polypropylene for the nonwoven and block copolymer films for the elastic

Art Unit: 1771

sheet) and in the similar production steps (i.e. necking the nonwoven prior to lamination) used to produce the elastic composite material. The burden is upon the Applicant to prove otherwise. *In re Fitzgerald*, 205 USPQ 594. In the alternative, it would have been obvious to a person having ordinary skill in the art to provide the claimed ultimate force to break properties in order to provide a composite with an increased resistance to breaking, since it has been held that discovering an optimum value of a result effective variable involves only routine skill in the art. *In re Boesch*, 617 F.2d 272, 205 USPQ 215 (CCPA 1980). Note *In re Best*, 195 USPQ 433, footnote 4 (CCPA 1977) as to the providing of this rejection under 35 USC 103 in addition to the rejection made above under 35 USC 102. With regard to claim 3, having between 2 and 50% of the thermoplastic fibers skewed in a direction greater than about 10 degrees from the machine direction is an inherent feature to the nonwoven web of Morman since the webs are made by meltblowing that involves random deposition of the fibers. With regard to claim 4, Morman teach the nonwoven web is made from microfibers with an average diameter of from about 4 to 40 microns (column 2, lines 32-37). It is known that 15-micron polypropylene is equal to 1.42-denier polypropylene; thus, Applicant's claimed range for fiber mass per unit area is clearly anticipated. With regard to claim 5, meltblown fibers are randomly deposited (column 2, lines 38-50). With regard to claim 6, Morman discloses the fabric can weigh between 0.2 and 10 ounces per square yard (column 6, lines 5-21). With regard to claim 10, Morman discloses the preferred use of low weight elastic sheets for economic reasons, but also discloses the use of sheets with a basis weight of up to 10 ounces per square yard (column 9, lines 1-7). With

regard to claims 13 and 29, although Morman does not explicitly teach the limitation of Dart Impact value for the elastic sheet, it is reasonable to presume that said limitations are inherent to the invention. Support for said presumption is found in the use of similar materials (i.e. block copolymer) and in the similar production steps (i.e. similar weights) used to produce the elastic sheet. The burden is upon the Applicant to prove otherwise. In the alternative, it would have been obvious to one having ordinary skill in the art to provide a polymeric film layer with a Dart Impact value of at least 400 grams in order to create a film that is puncture and resistant, since it has been held that discovering an optimum value of a result effective variable involves only routine skill in the art. With regard to claims 15-17, Morman discloses the nonwoven fabrics and elastic sheet can comprise multiple layers (column 3, lines 19-46).

***Claim Rejections - 35 USC § 103***

4. Claims 7, 8, and 12 rejected under 35 U.S.C. 103(a) as being unpatentable over Morman in view of Haffner et al. (U.S. Patent No. 5,789,065).

Morman do not teach the elastic sheet to be made from metallocene-based low-density polyethylene film. Haffner et al. disclose block copolymers and metallocene-catalyzed ethylene films as suitable elastic film layers useful in the same art of personal care products. It would have been obvious to one having ordinary skill in the art to use a metallocene-catalyzed ethylene film in the composite of Morman, since it has been held to be within the general skill of a worker in the art to select a known material on the basis of its suitability for the intended use as a matter of obvious design choice. *In re*

Art Unit: 1771

*Leshin*, 125 USPQ 416. With regard to claim 12, Morman does not teach perforating the elastic sheet. However, Haffner et al. disclose providing perforations in the elastic film layer allow it to be breathable. It would have been obvious to one having ordinary skill in the art to provide perforations in the elastic sheet of Morman in order to provide breathability to the composite, as taught by Haffner et al.

### ***Response to Arguments***

5. Applicant's arguments filed in Paper No. 10 have been fully considered but they are not persuasive.

6. Applicant argues that Morman teaches necking the nonwoven layers at ambient temperatures, which tends to tear and weaken both the fibers and the internal bonding between the fibers. This leads Applicant to the conclusion that because the nonwoven webs of Morman are necked at ambient temperatures, they are weaker than the nonwoven webs of the present invention. However, the burden is on the Applicant to show this through evidence. The Examiner believes that since the use of similar materials (i.e. polypropylene for the nonwoven and block copolymer films for the elastic sheet) and in the similar production steps (i.e. necking the nonwoven prior to lamination) make a similar composite material, that the claimed property would be inherent with Morman. Even if it were true that the composite of Morman is weaker than that of the present invention, it may still meet the claimed limitation of having an ultimate force to break of at least 3,000 g/in. Applicant must show that the material of Morman not only has an ultimate force to break that is less than the present invention, it must also be

shown that this value is below the claimed limitation. The Examiner notes the differences in the processing steps between Applicant's invention and Morman. However, there are no such processing limitations in the claims, and there is no evidence to indicate that such differences in the processing steps would create a composite with an ultimate force to break less than 3,000 g/in, such as present in Morman.

7. Applicant argues that it would not be obvious to modify Morman to provide a laminate with an ultimate force to break of at least 3,000 g/in, if such a property were not inherent, because there is no teaching as to how to make such a modification. However, strength of a material is a result effective variable that can be obviously modified by a person having ordinary skill in the art. Such a modification could be achieved simply by using stronger materials in the composite. Providing a desired strength property to a composite is an obvious modification.

8. Applicant argues that the web of Morman is not set in a transversely consolidated state before being bonded to the elastic polymeric film. In response to applicant's argument that the references fail to show certain features of applicant's invention, it is noted that the features upon which applicant relies (i.e., heating the precursor web and drawing the web under tension) are not recited in the rejected claim(s). Although the claims are interpreted in light of the specification, limitations from the specification are not read into the claims. See *In re Van Geuns*, 988 F.2d 1181, 26 USPQ2d 1057 (Fed. Cir. 1993). Morman's process of necking the nonwoven web sets it into a transversely consolidated state. Heating the web to a temperature between the softening

Art Unit: 1771

temperature and the melting temperature of at least 10% of the thermoplastic fibers is not a limitation in the claims. The term "set in a transversely consolidated state before being bonded to the elastic polymeric film" is only limiting in the sense that the web must be transversely consolidated. A nonwoven material can be held in a stretched position by two rollers and still be "set."

9. Applicant argues that Haffner do not teach the ultimate force to break of at least 3,000 g/in. Haffner is not used to teach this limitation.

### ***Conclusion***

10. **THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not mailed until after the end of the **THREE-MONTH** shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than **SIX MONTHS** from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Jeremy R. Pierce whose telephone number is (703)



Art Unit: 1771

605-4243. The examiner can normally be reached on Monday-Thursday 7-4:30 and alternate Fridays 7-4.


If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Terrel Morris can be reached on (703) 308-2414. The fax phone numbers for the organization where this application or proceeding is assigned are (703) 872-9310 for regular communications and (703) 872-9311 for After Final communications.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is (703) 308-0661.



Jeremy R. Pierce  
Examiner  
Art Unit 1771

December 3, 2002



ELIZABETH M. COLE  
PRIMARY EXAMINER